

USAWC STRATEGY RESEARCH PROJECT

DEFINING A FRAMEWORK FOR RECONSTRUCTION

by

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ABSTRACT

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As the international community, in support of United Nations (UN) sanctioned interventions, finds itself frequently tending to the reconstruction of failed states and the resolution of intrastate conflicts it has become clear that there is no common definition for reconstruction. In this void, commentary often appropriates the language of reparations which can negatively politicize the actions of intervening vindicators by focusing through a lens of guilt and blame associated with reparations. This paper posits that the international community can use the elements of reparations to develop a common language for reconstruction that avoids the negative while focusing on the potential for positive resolution of intrastate conflicts. This examination of how the elements of classic reparations programs have been used in the past and how America is using a mix of restitution, compensation, satisfaction, and rehabilitation to help build an Iraq that is "stable, just, and prosperous" will begin the process of developing a common understanding of the elements of reconstruction which can then serve as a foundation upon which to build the common language. From a common topical language, a systemic well engineered approach with broad applicability can then be developed.

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DEFINING A FRAMEWORK FOR RECONSTRUCTION

The Commission on Global Governance's publication *Our Global Neighborhood* posits, "Where people are subjected to massive suffering and distress there is a need to weigh a state's right to autonomy against its people's right to security. Recent history shows that extreme circumstances can arise within countries when the security of peoples is so extensively imperiled that external collective action under international law becomes justified."¹ It is in the aftermath of these conditions that reconstruction takes place.

In Iraq reconstruction is described as rebuilding and reform.² The tools that are being used to accomplish this rebuilding and reforming come out of elements of reparations as defined by the United Nation General Assembly Resolution 56/83³. As the international community, in support of United Nations (UN) sanctioned interventions, finds itself frequently tending to the reconstruction of failed states and the resolution of intrastate conflicts it has become clear that there is no common definition for reconstruction. In this void, commentary often appropriates the language of reparations which can negatively politicize the actions of intervening vindicators by focusing through a lens of guilt and blame of reparations. This paper posits that the international community can use the elements of reparations to develop a common language for reconstruction that avoids the negative while focusing on the potential for positive resolution of intrastate conflicts.⁴ As the U.S. Army/Center for Strategic and International Studies (AUSA/CSIS) report, *Play to Win*, Final Report of the bi-partisan Commission on Post-Conflict Reconstruction, states "although conceptual threads link [failed states], the approach to dealing with failed and [failing]states must be tailored to each use." Developing a common language of reconstruction may avoid the stigma of guilt or unjustness for nations that use acts of war to bring peace and security to failed states and other "abhorrent regimes."⁵

This paper will show that the elements of a reparations program – restitution, compensation, satisfaction, and rehabilitation⁶ - can be used as a basis for defining reconstruction. The initial discussion will review the definitions of reparations to highlight why, in this context, the collective term reparations should not be used, and why the elements of reparations have to be redefined within the reconstruction framework. This will be followed by a review of the historical uses of reparations to show how the elements have been applied in the past. The paper concludes with the development of a conceptual framework, largely based on American actions in Afghanistan and Iraq, which describes how each element can be used to achieve desired results in reconstruction actions. This examination of how the elements of

reparations have been used in the past and how America is using a mix of restitution, compensation, satisfaction, and rehabilitation to help build an Iraq that is "stable, just, and prosperous" ⁷ will develop an outline of the basic elements that should be incorporated into the language of reconstruction. The goal is not to provide a check list for reconstruction but to develop a common understanding of the elements of reconstruction which can then serve as a foundation upon which to build the common language. From a common topical language a systematic, well engineered approach with broad applicability can then be developed.

REPARATIONS DEFINED

The common definition, held by Webster's Ninth Collegiate Dictionary, is that reparations are "the act of making amends, offering expiation, or giving satisfaction for a wrong or injury; compensation exacted from a defeated nation by the Victors; compensation payable by a defeated nation for damages to or expenditures sustained by another nation as a result of hostilities with the defeated nation." The less common definition of reparations, also found in Webster's Ninth Collegiate Dictionary is "a repairing or keeping in repair." Under international law, reparations may refer to rehabilitation, financial compensation, restitution, satisfaction, and rehabilitation. Reparations programs are used to pursue two important goals: first, to ensure that States observe certain norms of international law; second, to repair, in so far as possible, any injuries caused as a result of a State's failure to meet such standards.

INTERNATIONAL LAW

Much of the concept of reparations as international law developed in WWII based on Nazi violations of international humanitarian norms.⁸ The nascent body of international law evolved from interpretations of internationalized versions of the domestic laws of Victorious nations and their common understanding of humanitarian and acceptable behavior⁹. The Permanent Court of International Justice stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."¹⁰

United Nation's International Law Commission (ILC) State Responsibility Articles, developed over a 30 year period, helped to codify the disparate rules and practices regarding reparations.¹¹ The ILC opinions, which were adopted by the 53rd United Nations as Resolution 56/83, provide among other issues an internationally recognized opinion on States responsibility to remedy internationally wrongful acts.¹² The Resolution sets general "rules of responsibility" rather than establishes specific "standard of conduct" for the behavior of the international community.¹³ These guidelines help to define when the line between right and wrong has been

breached rather than what actions a state must take to stay on the right side of that line. The articles describe modes of reparations that should be taken when the line has been breached – restitution, compensation, and satisfaction and advise when each can or should be invoked. The ILC articles additionally state that all States involved with a conflict, not just the vanquished can be assessed reparations. Any State which violates the tenets of jus ad bellum can be required to provide reparations for damages caused by their armed forces during the course of the conflict.

Together The Hague Regulations of 1907¹⁴ and 1949 Geneva Convention¹⁵ form the basis for international “law of war.” Both documents apply responsibility for damages caused by unlawful acts of war equally to the Victor Nation and the Defeated Nation. Thus victory “at any cost” is not an option for either party in war and holds to the tenets of jus in bello.

United Nations General Assembly Resolution 56/83 28 Jan 2002: Article 31: A responsible State must make reparation to the injured State caused by a wrongful act. Must make full reparation for the damage caused by the wrongful act –either moral or material.

- Article 35: Restitution – re-establish the situation which existed before the wrongful act was committed if, 1) materially possible and 2) the burden is not disproportionate to the benefit derived from restitution instead of compensation.
- Article 36: Compensation – Obligation to compensate for damage caused by the wrongful act if the damage is not made good by restitution. Damages must be financially assessable and may include loss of profits.
- Article 37: Satisfaction – Obligation to give satisfaction for the injury caused by the act when the injury cannot be made good by restitution or compensation. Satisfaction may include acknowledgement of the breach, an expression of regret, or a formal apology but must not be intended to humiliate the responsible State.

As currently defined it becomes clear why the term “reparations” is ill suited to refer to the actions of UN sanctioned interventions. By legal definition, as well as in common understanding, reparations stem from wrong doing or unlawful action. As with the intervention of the UN in Kosovo and Somalia and other UN sanctioned operations there is no unlawful aggressor whose actions serve as the basis for invoking reparations. This is also where the language of reparations is insufficient. A review of documents referring to reparations shows that the parties are labeled as “victim or aggressor,” “victor nation or defeated nation.” In reconstruction, to encompass the role of the intervening international community these labels should be expanded to include “vindicator” as described by Brian Orend in his article *Justice in War*.¹⁶

This legal definition addresses the economic remedies due for injuries sustained by a breach of the laws of war and related conventions but there are also social and political ramifications to reparations for both the giver and the receiver. Economically, they can represent a way for the victors to recoup the costs of war or to dictate the pace of the defeated nation's economic recovery. In a social context, reparations can cause lasting bitterness for having to pay too much, for receiving too little, and by leaving some feeling the sting of inequitable distribution amongst allies. History has shown that although reparations serve the political purpose of punishing the defeated nation and setting the boundaries for its postwar behavior, they are also the initial steps necessary to reorient the defeated nation's moral place in the international community.¹⁷ Increasingly, nations are using the mechanisms and the "language of reparations" to settle political claims¹⁸ outside of the courts as the Canadian Parliament did in the case of Japanese Canadian World War II claims. The fact that reparations have been used to settle three well known conflicts in the past century may be the reason that it has been easy for commentators to adopt the terms associated with classic reparations programs when discussing the post conflict situation in Iraq and Afghanistan.

HISTORICAL PERSPECTIVE OF REPARATIONS

When war ends history has shown that in addition to political and economic sanctions, victorious nations usually affix a price tag to the cost of their suffering in the form of reparations. In the traditional lexicon of reparations, the victorious nations imposed the payment of war reparations on defeated, aggressor states that are deemed guilty of causing damage through violations of international law. Reparations, which have a historically negative connotation, have been used with varying degrees of success and failure in the past - after World War I with Germany, after World War II with Japan, and after Desert Storm with Iraq. These cases show that within reparations programs there exists the risk of not satisfying the constituency and getting unintended outcomes. Reparations plans are usually multi-faceted plans developed by the victor using the elements of restitution, compensation, satisfaction, and rehabilitation to strike a balance between rebuilding the conquered society and reimbursing the Victors for their losses. A review of reparations plans in Germany (WWI), Japan (WWII), and Iraq (Desert Storm) will highlight how the combination of these elements achieved certain results.

GERMANY AND THE VERSAILLES TREATY¹⁹, WORLD WAR I

The primary aim of reparations for Germany after World War I was the devolution of German industrial might and full restitution for the victims i.e. the restoration of the European economy and infrastructure to pre-war levels. Few leaders in the international community of the

time foresaw the catastrophic, unintended costs of the war reparations imposed on Germany at the end of World War I. Prior to World War I, warring factions understood the advantage of agreeing to a peace settlement well before the costs of Total War had been paid. Often the decision to continue war or to agree to peace rested on the warring parties' ability to afford the costs of maintaining (feed, house, train) an army. Under the concept of reciprocity²⁰, one side was able to win without expending all of its capital in order to do so, just as the defeated faction was able to withdraw without bankrupting its coffers. World War I saw a change in the price that states were willing to pay to win a war. Germany and the Central Powers fought a particularly vicious war that caused incredible damage and was extremely costly for the Allies to prosecute. It was not until World War I that governments came to a common agreement on the legal basis for collecting compensation from defeated states.

Attitudes about reparations varied somewhat amongst the Allies. An international committee, the Reparation Commission, was established by the Treaty to adjudicate claims, receive payments, and dispense payments. Permanent members of the Committee were the United States, Great Britain, France, and Italy. A single rotating seat was shared by delegates from Belgium, Japan, and the new Serbo-Croat-Slovene State. Germany was required to pay the salaries and associated costs of administering the Commission. Reparations were assessed in cash and in-kind (equipment, livestock, intellectual property, raw materials, and artifacts) to enable the Allies to rebuild their decimated economies. America's President, Woodrow Wilson, saw this as a chance to push adoption of the Fourteen Points Plan as a long-term solution²¹. As articulated in the Peace Treaty of Versailles signed in 1919, Germany accepted the collective responsibility for damages caused by the Central Powers' (Germany and her allies) aggression towards the Allies. In accepting this responsibility, Germany also accepted responsibility for compensating the Allies for damages. In recognition of the fact that Germany had insufficient resources to pay for all damages caused by her aggressive acts "by land, by sea, and from the air," the Allies agreed that, in most cases, she would only be responsible to compensate the Allies for damages to their "civilian populations and associated property."

Leading British Conservatives, such as diplomat David Lloyd George²² and John Maynard Keynes²³, contended that Germany could not afford to pay reparations. They focused on developing a moderate reparations plan that would not set the stage for future conflict. To France, reparations were seen not as compensation to the Victor but more as punishment to the defeated and so France pushed for not only the complete restoration of her conquered lands and but also the subjugation of Germany's people and the total annihilation of Germany's ability to rearm and make war.

The initial lack of understanding of the burgeoning interconnectedness of the world's economies contributed to the German reparation plan failing to accomplish its stated purpose. In 1922 at the Genoa Conference, 34 nations attempted, but failed, to develop a cohesive economic strategy for the European economy that excluded Germany. Germany, stripped of her cash, her industrial base and her hope of beginning an internal recovery, entered into the Treaty of Rapallo with Russia. Through this treaty, Germany gained an active trading partner that helped to stimulate economic recovery and provided access to the industrial base needed to rebuild its war making machinery. As the European economic recovery continued to falter, the international community began to understand that Germany would need outside intervention to meet its reparations commitments. Two plans evolved - the Dawes Plan in 1924 and the Young Plan in 1929 – as tools to restructure the German reparations debt. The plans did not have the intended result and Adolph Hitler defaulted on all remaining payments when he assumed power.

Despite an aggressive reparations plan, one country – Germany - simply could not fund Europe's recovery. Europe as a whole was suffering the economic damage of war destroyed infrastructure and industrial bases that had been converted to support years of war making activities. Germany's economic crisis severely hindered France and Belgium's ability to recover since they had built their economic recovery plans on the expectation of Germany reparations. When receipts did not meet expectations, their economic recovery stalled. Frustrated at the lack of funds coming out of Germany, France and Belgium sent troops to occupy the Ruhr, Germany's main industrial and raw material center, and French and Belgian workers to mine and export the resources. For two years, profits from the Ruhr area were funneled out of Germany and directly into the French and Belgian economies. This two-year standoff between German workers and the French and Belgian governments created additional resentment amongst German, French, and Belgian citizens. The loss of the Ruhr helped to complete the collapse of the German economy. This economic collapse fed on the fuel of resentment and led to social collapse that set the stage for Hitler's Socialist Party and World War II²⁴.

JAPAN AND THE TREATY OF PEACE, WORLD WAR II

Far different than Germany's post - World War I punitive experience was the state building reparations plan developed after World War II to build up Japan as an economic trading partner and to provide minimal compensation to victims. Once the peace had been secured in Europe in May 1945 by the Yalta Agreement, the "Three Powers" - US, Great Britain and China - set the terms for Japan's unconditional surrender in the Potsdam Declaration. Six years later, the 1951 Treaty of Peace officially ended hostilities between Japan and the US and set the framework for

Japan to negotiate reparations with the Victors and to prepare for entry into the United Nations. In the treaty the Allies acknowledged that although Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war”, they also recognized that Japan’s limited available resources should be used to rebuild Japan toward an independent, economically sound country and so focused on defining reparations in the form of labor services for “production, salvaging, and other work”.

Much more sophisticated at this time in their understanding of second and third order effects of reparations plans, the Allies developed a program that put support of Japanese economic recovery as the primary goal. Central to the treaty was for Japan to be able to maintain enough industry to generate sufficient revenue to support her economy, fulfill her obligations to pay reparations-in-kind but not enough to re-arm²⁵. Under the treaty, confiscated Japanese assets were available to compensate some of the Allies and Japan was required to pay the \$580 million occupation costs. Drafters of the Japanese plan ensured that Japan was to provide restitution, not reparations (limited to repairing damage) for property related losses and damages as specifically delineated by the Allies in the Treaty. All of the governments (Allies and Japan) that signed the treaty waived the right for individual citizens of their respective nations to ever successfully file a claim against the Japanese government. During the Occupation, the Allied occupying forces had succeeded at rebuilding a Japan whose industrial engine enabled her to use the reparations process as a way to prime the engine of East Asian commerce. By the time the Treaty was enacted, the commercial fleet had been completely replaced, shipyards were operational, and Japan had become a full trading partner with the United States. Although significant bitterness existed amongst the other Allied nations for the US’s subsidy of Japan’s recovery while they were themselves endeavoring to recover from the blows dealt by Japan in their territories, East Asia as a whole prospered²⁶. Throughout East Asia, recipient nations used the payments to develop their national economies. They also used the payments to fund significant trade programs with Japan, which helped her to become the major economic power in the region.

IRAQ AND UNSC RESOLUTION 687 (1991), DESERT STORM

The UN’s goal for Iraqi reparations were to financially compensate Kuwait and other victims who suffered loss as a result of the Iraqi invasion of Kuwait in such a way that would have a minimal negative impact on the Iraqi people.²⁷ Iraq’s invasion of Kuwait was declared unjust by the UN. The UN Security Council, through Resolution 687, determined that Iraq was “liable under international law for any direct loss, damage, or injury to foreign Governments,

nationals, corporations as a result of the unlawful invasion and occupation of Kuwait.” A formal cease-fire between Iraq and the Allied Coalition forces was made contingent upon Iraq's acceptance of all of the provisions of the resolution.

The UN developed a reparations plan which appears to incorporate lessons learned from previous reparation plans such establishing an oversight body and tempering the impact of reparations on the common citizen. Under the resolution, a fund supplied by Iraqi oil revenue profits was established to pay adjudicated claims. The United Nations Compensation Commission (UNCC) as a neutral party was established in 1995 by the UN to “determine and resolve claims” and “to administer the (claim) fund.” The UN approved a special provision for Iraq to sell up to \$1.6 million dollars in oil above the food-for-oil sanction levels so that funding the UNCC would not come at the expense of the well being of the Iraqi citizens. The amount of oil revenue that could be directed to the fund was also capped [originally capped to 30 percent of Iraq's oil revenues, reduced to 25 percent in 2000, and in May 2003 reduced to a maximum of 5 percent]²⁸ to ensure that reparations would not be funded to the detriment of Iraqi citizens. The Saddam Hussein regime chose not to take advantage of this provision as a way to protest against the assignment of reparations and the UN proscribed claims process. To date the UNCC has approved \$46.25 billion in claims although only \$18.0 billion have been paid.²⁹ Ninety seven billion dollars is a sizeable debt for a nation intent on rebuilding itself in the wake of war and one that some believe is an “odious debt” to be repaid solely by Saddam Hussein, the person who incurred it³⁰. Unfortunately given the sheer size of the debt, the many alternative means available for victims to pursue claims, and the willingness of the Iraqi regime to sacrifice the Iraqi people in lieu of taking accountability for the damages caused by the invasion, there was little chance that the plan could succeed.

The results of the reparations plans for Germany, Japan, and Iraq may not have developed as envisioned by the developers of the plans and the same may hold true for the reconstruction efforts of America and her coalition partners in Iraq. The American planners seem to have, however, found a way to take the best elements of something with a negative connotation, reparations, and to develop a plan that is enabling Iraq to develop the “economic pre-conditions of peace and free government.”³¹ Its use of restitution, compensation, satisfaction and rehabilitation in the reconstruction process have enabled Iraq to restore essential infrastructure, support health and education services, expand economic opportunity, improve government efficiency and accountability and provide humanitarian assistance (USAID).

CONCEPTUAL FRAMEWORK FOR RECONSTRUCTION ELEMENTS

Operating under guidelines of UN Resolution 1483 and US Army Field Manual No. 27-10, The Law of Land Warfare (FM 27/10)³², the US has had minimal internationally accepted reconstruction guidance to serve as the framework for the development of its post-conflict plans for rebuilding an Iraq that can take a legitimate place in the international community³³. However if one was to review information on the Iraq reconstruction program that is available to the general public, it appears that America has based reconstruction on the elements of classic reparations programs - restitution, compensation, satisfaction³⁴ and rehabilitation³⁵.

The purpose of this section of the paper is not to look at the justness of Operation Enduring Freedom and Operation Iraqi Freedom, that has already been confirmed vis a vis UN Security Council Resolution 1483. True to the tenets of The Hague Rule of 1907 and the 1949 Geneva Conventions, the United States government is bearing the full responsibility for the actions of its armed forces. This section will discuss the elements of a reparations program and how America's use of those elements in Afghanistan and Iraq provide lessons that can be used to develop a framework for reconstruction, a template to follow with broad applicability, similar to the UN framework for reparations. Reports from Afghanistan and Iraq provide examples of how the U.S. has incorporated all four elements of reparations in the rebuilding of Iraq.

RESTITUTION AS AN ELEMENT OF RECONSTRUCTION

Restitution in the context of reconstruction may not simply be returning the nation to status quo ante bellum. Because of extended periods of pre-intervention infrastructure neglect, civil unrest, and large debt loads these countries may require the intervening forces to restore the situation to better than status quo ante bellum. The developers of the plan must decide on how to balance the distribution of the defeated nation's assets between paying for its own future recovery, paying its outstanding debts, and possibly compensating internal parties that may have been injured under the previous regime. In these situations, the defeated countries may be unable to focus their internal resources on recovery without additional international economic intervention such as has been seen with the Paris Club for Haiti's debt in 1995 and the Madrid International Donors Conference (IDC) in October 2003 regarding Iraq's debt.³⁶ In the case of Haiti's \$117 million debt in 1995 the Paris Club reduced the debt by 33%, rescheduled repayment over 23 years, provided a 6 year grace period to begin payments.³⁷ The International Donors Conference was held to solicit financial assistance for the reconstruction of Iraq. According to Kuwaiti Prime Minister Sheikh Sabah al-Ahmad al-Sabah, the reconstruction of

Iraq concerns the whole world, "A significant reduction of Iraqi debt will provide an opportunity to rebuild a free and prosperous Iraq." Kuwait pledged \$500 million at the IDC however it has refused to absolve Iraq from the \$170 billion it believes is owed in war reparations. Based on basic economics, it can reasonably be assumed that every Iraqi dollar used to pay the debts increases the time that it will take to rebuild the nation. However, once oil revenues return to previous levels, the new government should be able to handle some level of debt repayment as well as the anticipated \$36 billion annual reconstruction bill³⁸. As the Allied occupation ended in 1951, John Foster Dulles, President Truman's peace treaty negotiator, pushed for Japanese restitution because he was certain that using Japan's assets to pay war reparations would have caused the same negative results as in post-World War I Germany³⁹.

One lesson taught by the U.S. government in Iraq is to meet today's needs today. The U.S. government, as of January 2004, through the Commanders' Emergency Response Program (CERP) had completed \$126 million in local projects to repair and rebuild the towns affected by Operation Iraqi Freedom.⁴⁰ The CERP program provides a cash fund to local military commanders to fund local projects such as repairing badly deteriorated infrastructure. These projects have been critical to providing basic services and developing goodwill with the Iraqi people by returning some equipment to better than status quo ante bellum condition. Through the Commanders Emergency Response Program, America is making the most of the service members who interact daily with the citizens by putting the money directly into the hands of those who can make a difference every day. America's troops have set an example of how international troops can do the job of intervention while upholding international law with respect to repairing the unintentional damages of war and responsibilities of occupation. History will document that the US went above and beyond its responsibility to return Iraq to status quo ante bellum.

COMPENSATION AS AN ELEMENT OF RECONSTRUCTION

Compensation, the purely economic element of reconstruction, deals with both the vindicator and the aggrieved party coming to a mutually agreeable dollar value to assign to a mutually agreed upon loss. As of February 2004, America has adjudicated and paid \$2.2 million dollars to Iraqi civilians for injuries or deaths as a result of US military actions after the cessation of hostilities.⁴¹

To help Afghan communities and families that suffered damages as a result of US actions, the U.S. government authorized the use of federal funds to provide direct reconstruction assistance up to \$2.5 as of May 2003⁴². Cash was not distributed from these funds as that might

have been construed as reparations but rebuilding assistance was provided for damaged property. Additionally, America has committed \$2.5B for direct rebuilding assistance⁴³ to ensure that support and compensation are available when and where deserved. Through the Foreign Claims Act,⁴⁴ also used in Afghanistan, families received cash payments up to \$2500 per person in the case of injury, death, or property damage resulting from non-combat operations. There has been some disgruntlement with the \$2500 injury benefit and \$10,000 death benefit paid by the Gulf War UNCC. Some family members have argued that compensation caps were set to arbitrarily low amounts and did not provide adequate compensation for their losses. This dissatisfaction with the settlement process has engendered a lasting bitterness with the UNCC claims process and limits the victims ability to move forward towards rehabilitation.⁴⁵

SATISFACTION AS AN ELEMENT OF RECONSTRUCTION

When the U.N. intervenes in a country that has been without proper governance and accountability, the need for satisfaction in the context of reconstruction cannot be overrated. Satisfaction speaks directly to accountability⁴⁶, both economically and socially. Economic accountability is handled through restitution and compensation. Social accountability, the moral construct for reconstruction, is handled through satisfaction. Satisfaction in the simplest terms is an apology. The apology comes in many forms, but whatever its form, the apology equals respect and acknowledgement of the moral principles that the victim believes to have been violated. American occupying forces understanding of the importance of satisfaction has been evident throughout the occupation through the aggressive use of the CREP and face to face interaction with the Iraqi citizens. The U.S. has learned some lessons from Afghanistan – a visit to a grieving parent, naming a school after an accidentally killed community member, replacement of a destroyed building – are important to making victims feel that someone has not only acknowledged their loss, but also accepted responsibility for mitigating the affects of that loss.

Effective use of satisfaction understands that the victim must feel that the restitution adequately compensates them for their suffering and loss. Still unsettled for the Japanese government are the requests for the payment of war reparations for damages inflicted on the “Comfort Women” of World War II.⁴⁷ These women, mostly Korean, were held in sexual slavery for the “comfort” of the Japanese troops and have never been legally classified as victims of war crimes despite standing anti-slave trafficking and prisoner-of-war treatment conventions. Although, the Japanese government did offer \$19,000 and an apology for the abuses suffered by the women, most did not accept the offer. The offer was refused because many of the

women felt that the amount of cash that was offered was not enough to compensate for their losses and, more important, a government acknowledgement of guilt was not included. Still also unresolved are the cases of the U.S. prisoners of war (POW) who served as slave labor for Japanese industry during the war. These former POWs are suing because they do not believe that the \$1.50 per day of captivity that the US government agreed to in the Paris Peace treaty adequately compensated them for their suffering.⁴⁸

REHABILITATION AS AN ELEMENT OF RECONSTRUCTION

Rehabilitation in the context of reconstruction concerns issues of “disarmament, police and judicial training; human rights education; judiciary and bureaucracy reform”⁴⁹ as used to develop national organizations that support democratic and ethical governance. Rehabilitation, which is the reconstruction of the basic structure of civil society, commonly occurs in the aftermath of regime change, extended periods of “bellum omnium contra omnes”⁵⁰ and governance by non-state actors. Rehabilitation takes place in an environment that civil law describes as “negotiorum gestio.”⁵¹ Negotiorum gestio is the management of the affairs of one who is absent, spontaneously undertaken without his knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference. In the environment in which a state government has ceased to provide for humanitarian and governance needs of the citizens in accordance with international law, the UN as the “gestor,” assumes the responsibility to take action on behalf of the citizens of the defeated nation, the “dominus negotiorum,” because the nation is incapable of doing so for itself. During reconstruction, despite lack of consensus among the citizens, it will be up to the UN to pursue the business of reconstruction until defeated state is able to assume self-governance.⁵²

Reconstruction efforts in Iraq and failed states are not only geared towards rebuilding electrical grids and sewer systems but also, through rehabilitation, restoring “a sense of civil society” to states often rife with religious and ethnic divisions and years of brutal oppression by corrupt regimes.⁵³ As of July 2003, \$1.37 billion had been allocated by the U.S. government for re-establishing critical services, ministries, oil production, and security forces which are all important to the re-establishment of civil society.⁵⁴ The U.S. Agency for International Development’s (USAID) funding, infrastructure redevelopment and assistance has been essential to the establishment of town councils. These local governance teams are providing access to Iraqi citizens to the political process as it is being developed.⁵⁵

Political rehabilitation may be the most sizeable and difficult element of reconstruction in the wake of regime change. In the case of Germany after World War I, there was no thought

given to rehabilitating German civil society. The goal instead was to ensure that Germany never regained her previous political and military strength.⁵⁶ In the case of Japan after World War II, rehabilitation efforts focused on developing Japan into a non-aggressive, economic development anchor for Asia.⁵⁷ At the end of the Gulf War, efforts to rehabilitate Iraq included sanctions and UN observers. Both failed to address the core defect represented by the Ba'athist dictatorship. Eventually this failure required regime change during Operation Iraqi Freedom to fully rehabilitate Iraq. One suggestion for the command and control of failed states and defeated nations has been for the UN to issue a resolution that establishes a UN Trusteeship Council-type relationship so that the UN can provide oversight while the state develops the democratic institutions required.⁵⁸

SUMMARY

The need to define reconstruction will grow as the international community continues to intervene in countries such as Kosovo, Somalia and in failing states where there is no traditional governmental structure to take over the reins such as Haiti and Somalia. This growing concern exposes the need for a basic reconstruction template with broad applicability. However, in order to discuss and plan for reconstruction, the international community needs to develop a common language to discuss it. A lack of a common understanding of mechanisms of reconstruction - restitution, compensation, satisfaction, or rehabilitation - among coalition partners can lead to unintended outcomes when reconstruction plans are developed and executed. As seen in commentary relating to coalition actions in Afghanistan and Iraq, the international community is not equipped with a language with which to discuss reconstruction. Lacking such a language, the terms previously associated with reparations programs have been appropriated.

Before adoption of the elements of reparations programs as the de facto elements of reconstruction, the international community should garner lessons learned on the effect of the various elements of reparations from a historical review of reparations programs in Germany, Japan, and Iraq. They should also look to America's use of the elements of classic reparations programs to reconstruct Iraq. After this review, common definitions for the elements of reconstruction can be fixed. From a common language, a template for a systematic approach, that can be modified to meet the circumstances at hand, can be developed. This is the beginning and necessary first step to define both the elements of a reconstruction program and develop a working template for future planning actions. Once developed, this framework can then be used to cultivate political, economic, and social systems and infrastructures that offer the citizens of failed states a "more secure possession of rights" than had under previous

regimes. It took the UN thirty years to develop the shared language used for the current dialogue regarding reparations issues around the globe. Using the elements of reparations - restitution, compensation, satisfaction, and rehabilitation - as the framework for their actions, the US government has assisted the Iraqis in the initial development of a government. This newly established government will be positioned to "assume authority over a country ready, both internally and externally, to function economically, provide basic services to its citizens, provide for its own defense, and to play a responsible role in the international community of nations" when they leave in June 2004.⁵⁹

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ENDNOTES

¹ The Commission on Global Governance, *Our Global Neighborhood*, (Oxford: 1995), 71; quoted in Daniel Thurer, "The Failed State and International Law," 31 December 1999; available from < <http://www.globalpolicy.org/nations/sovereign/failed/2003/0725law.htm>>; Internet; accessed 14 December 2003.

² United States Agency for International Development (USAID), "Assistance for Iraq-Contracts and Grants," 2004; available from <<http://www.usaid.gov/iraq/contracts/errsgi.html>> ; Internet; accessed 14 February 2003.

³ Elements of reparations as defined by the United Nations General Assembly:

- Chapter II, Article 31: A responsible State must make reparation to the injured State caused by a wrongful act. Must make full reparation for the damage caused by the wrongful act –either moral or material.
- A Chapter II, Article 34: Forms of Reparation- Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.
- Chapter II, Article 35: Restitution – Re-establish the situation which existed before the wrongful act was committed if, 1) materially possible and 2) the burden is not disproportionate to the benefit derived from restitution instead of compensation.
- Chapter II, Article 36: Compensation – Obligation to compensate for damage caused by the wrongful act if the damage is not made good by restitution. Damages must be financially assessable and may include loss of profits.
- Chapter II, Article 37: Satisfaction – Obligation to give satisfaction for the injury caused by the act when the injury cannot be made good by restitution or compensation. Satisfaction may include acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State. See United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts, Resolution 56/83* (28 Jan 2002).

⁴ Tony Lang and Mary-Lea Cox, "Justice After War," <INPRINT> *Carnegie Council Newsletter*, November/December 2002, 1.

⁵ Brian Orend, "Justice After War," *Carnegie Council on Ethics and International Affairs Volume 16, No. 1* May 2002 [journal on-line]; available from <http://www.cceia.org/media/277_orend.pdf> ; Internet; accessed 28September 2003.

⁶ Ibid. Rehabilitation is an additional element of reparations addressed by Orend and Walzer which relates to the political rehabilitation and the "construction and maintenance of a new kind of domestic political regime...one more peaceable, orderly, and pro-human rights in nature." Orend uses the example of the rehabilitation of West Germany and Japan after World War II to illustrate the high cost and commitment required to impose rehabilitation.

⁷ George W. Bush, "President's Weekly Radio Address," transcript, Washington D.C., 11 October 2003; available from < www.whitehouse.gov >; Internet; accessed 2 December 2003.

⁸ Paper presented at the Stephan A. Riesefeld Symposium "Fifty Years in the Making: World War II Reparation and Restitution Claims" held in Berkeley, March 8-9, 2001. See Elizabeth Hutton and Mark S. Ellis, "Policy Implications of World War III Reparations and Restitution as Applied to the Former Yugoslavia," *Berkeley Journal of International Law*, March 2001, (6957) [database on-line]; available from Lexis-Nexis; accessed, 17 October 2003.

⁹ Michael Walzer, *Just and Unjust Wars*, (New York: Basic Books, 1977), 114-119.

¹⁰ The Court gave examples of "the principles which should serve to determine the amount of compensation due for an act contrary to international law." Such principles included "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it." See Permanent Court of International Justice, "Judgment No. 13, Case Concerning The Factory At Chorzow (Claim for Indemnity) (The Merits) P.C.I.J., Series A, No. 17," 13 September 1928; available from < <http://www.worldcourts.com/pcij/eng/cases/chorzow2.htm> > ; Internet; accessed on 16 October 2003.

¹¹ The UN chartered the ILC to "draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." Over a 30 year period (1962- 2001), the ILC' developed the Articles of State Responsibility which were later codified as UN General Assembly Resolution 56/83.

¹² UN General Assembly Resolution 56/83.

¹³ Daniel Bodansky and John R. Crook, *The ILC's State Responsibility Articles* The American Journal of International Law October 2002 [journal on-line]; available from < <http://www.asil.org/ajil/ajil024.pdf> > ; Internet; accessed 7 December 2003.

¹⁴ Regulations concerning the Laws and Customs of Land Warfare.. "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." See Hague Convention IV. *Laws of War: Laws and Customs of War on Land*; 18 October 1907. Art. 3

¹⁵ Regulations concerning the Laws and Customs of Land Warfare. See Geneva Convention (1949) Part V, Article 91 – Responsibility. "Violators of the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

¹⁶ Orend, 48.

¹⁷ Walzer.

¹⁸ Sidney Haring, "German Reparations to the Herero Nation: An Assertion fo Herero Nationhood in the Path of Namibian Development," *West Virginia Law Review* Winter 2002 [journal on-line]; available from < <http://www.academic.udayton.edu/race/06hrights/georegions/africa/nambia01/htm> > ; Internet; accessed 14 December 2003.

¹⁹ *Treaty of Peace Between the Allied and Associated Powers and Germany*, Articles 231 – 247 (28 June 1919); available from < <http://www.lib.byu.edu/~rdh/wwi/versailles.html> > ; Internet; accessed 28 September 2003. June 28, 1919,;

²⁰ For a simple discussion on the laws of war see Houghton Mifflin Company, *Readers Companion to Military History*; available from < <http://college.hmco.com/history/readerscomp/ml/html/> >; Internet; accessed 28 September 2003.

²¹ *Conditional Acceptance of the Fourteen Points Foreign Relations of the United States*, (Washington, D.C., 5 November, 1918), Supplement, I, 468-69; available from <<http://www.lib.byu.edu/~rdh/wwi/1918/allies14.html> >; Internet; accessed 28 September 2003.

²² Statement by the Right Honorable David Lloyd George, British Government. See David Lloyd George, "British War Aims," 5 January, 1918. available from < <http://www.lib.byu.edu/~rdh/wwi/1918/waraims.html> >; Internet; accessed 28 September 2003.

²³ John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace & How, 1920), 225.

²⁴ Michael Liebig, "Recovery Program Could Have Blocked Hitler's 'Legal Coup'," *Executive Intelligence Review* Volume 26, Number 10, March 1999.[journal on-line]; available from < http://www.larouchepub.com/other/1999/liebig_schleicher_2610.html >; Internet; accessed 28 September 2003.

²⁵ Australian Deputy of Foreign Affairs and Trade, "Japanese Reparations," cablegram from Australian Government to Gordon Walker and Fraser, 20 April 1948, available from < <http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/7710FAA9E211DB11CA256B7F000B77C8> >; Internet; accessed 14 October 2003.

²⁶ Notes for a Lecture given at State University of New York, College at Plattsburgh by Consul General Fumiaki of Japan at Montreal. See Takahashi Fumiaki, "Japanese Development Aid policy: Its objectives and Effectiveness," 5 April 2000; available from < http://www.mofa.go.jp/policy/oda/summary/1999/ref2_01.html > ; Internet; accessed 14 October 2003.

²⁷ United Nations Security Council, Resolution 687/1991 (8 April 1991).

²⁸ Carl Conetta, "Reconstructing Iraq: Costs and Possible Income Sources," Briefing Memo #28, Project on Defense Alternatives, 25 April 2003; available from < <http://www.comw.org/pda/0305bm28.html> > Internet; accessed 14 October 2003.

²⁹ United Nations Compensation Commission, *Claims Report* . (New York: United Nations, 2004); available from < <http://www.unor/uncc/claims> > ; Internet; accessed 19 October 2003.

³⁰ Odious Debts as defined in 1927 by Alexander Sack, a Russian international law scholar, "If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State. This debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls with the fall

of this power. The reason these "odious" debts cannot be considered to encumber the territory of the State, is that such debts do not fulfill one of the conditions that determine the legality of the debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interests of the State. Sack, a former minister of Tsarist Russia and, after the Russian Revolution, a professor of law in Paris, authored two major works on the obligations of successor systems: *The Effects of State Transformations on Their Public Debts and Other Financial Obligations* and *The Succession of the Public Debts of the State*. *The Doctrine of Odious Debts*. See Patricia Adams, *Odious Debts: Loose Lending, Corruption, and the Third World's Environmental Legacy* (Ontario Canada: Energy Probe Research, November 1991); Excerpt available from < <http://www.probeinternational.org/probeint/OdiousDebts/OdiousDebts/index.html> > ; Internet; accessed 28 September 2003.

³¹ Jack Beatty, "God Bless Russia: A Marshall Plan for Russia", 23 October 2003; available from < <http://www.tompaine.com/feature2.cfm/ID/3785> > ; Internet; accessed 12 December 2003.

³² DEPARTMENT OF THE ARMY, *Field Manual No. 27-10*, (Washington, D.C.: U.S. Department of the Army, 18 July 1956).

³³ United Press International, "WTO Gives Iraq Observer Status," 11 February 2004; available from < <http://washingtontimes.com/upi-breaking/20040211-012840-2708r.htm> > ; Internet; accessed 12 February 2004.

³⁴ United Nations General Assembly Resolution, *Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83 (2002).

³⁵ Orend, 47.

³⁶ World Bank News Release Release No:2004/171/MNA. See Sereen Juma, "Iraq: Tally Shows Pledges From Madrid October Donors' Conference Total \$32 Billion," available from < <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS.html> > ; Internet; accessed 2 December 2003.

³⁷ "The Paris Club is an informal group of official creditors whose role is to find co-ordinated and sustainable solutions to the payment difficulties experienced by debtor nations. Paris Club creditors agree to rescheduling debts due to them. Rescheduling is a means of providing a country with debt relief through a postponement and, in the case of concessional rescheduling, a reduction in debt service obligations. The first meeting with a debtor country was in 1956 when Argentina agreed to meet its public creditors in Paris. Since then, the Paris Club or ad hoc groups of Paris Club creditors have reached 374 agreements concerning 78 debtor countries. Since 1983, the total amount of debt covered in these agreements has been \$416 billion. In spite of such an activity, the Paris Club has remained strictly informal. It is the voluntary gathering of creditor countries willing to treat in a co-ordinated way the debt due to them by the developing countries. It can be described as a "non institution." Although the Paris Club has no legal basis nor status, agreements are reached following a number of rules and principles agreed by creditor countries, which help a co-ordinated agreement to be reached efficiently." See Paris Club, "Previous Paris Club Agreements,"; available from < <http://www.clubdeparis.org/en/countries/countries> > ; Internet. accessed 16 October 2003.

³⁸ James Wolfenson, "Iraq Reconstruction and Multilateralism in Development," transcript of briefing and interview, National Press Club, New York, 30 October, 2003; available from. < <http://www.usinfo.state.gov/xarchives> > ; Internet; accessed 14 December 2003.

³⁹ Full text version of the speech is available in the University of Tokyo Database of Postwar Japanese Politics and Diplomacy Japan-U.S. Relations. See John Foster Dulles, "Speech at the San Francisco Peace Conference," 5 September 1951; available from <http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JPUS/19510905.S1E.html> > ; Internet accessed 14 October 2003.

⁴⁰ CERP overview provided by BG David N. Blackledge, Commander, 352nd Civil Affairs Command. See BG David N. Blackledge, "Commander's Emergency Response Program," Coalition Provisional Authority Briefing, Iraq, 14 January 2004; available from <<http://www.dod.mil/transcripts/2004/tr20040114-1144.html> > ; Internet; accessed 15 February 2004.

⁴¹ Christian Asquith, "What Iraqis Receive For Their Losses," Christian Science Monitor. 23 February 2004; available from. < <http://ebird.afis.osd.mil/> > ; Internet; accessed February 23, 2004.

⁴² Public Law 108-11, "Emergency Wartime Supplemental Appropriations Act, 2003. See Patrick Leahy, "New U.S. Aid Provisions for Civilian War victims in Iraq and Afghanistan," 15 May 2003; available from < <http://iraqvictimsfund.org/press3htm> > ; Internet; accessed 12 December 2003.

⁴³ Congress' continued support through the Iraq War Supplemental signed 16 April 2003

⁴⁴ The Foreign Claims Act (FCA) provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to non-combat activities of military personnel overseas. Although the U.S. Government's scope of liability under the FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government. Chapter VIII, part B, of the JAG Manual prescribes the requirements for the investigation and adjudication of FCA claims. See *The Foreign Claims Act, U.S. Code*, vol. 10 secs. 2734-2736 (1982).

⁴⁵ Roger P. Alford, "On War as Hell," *Chicago Journal of International Law*. (Spring 2002): Vol. 3, Iss.1:207 [database on-line]; available from ProQuest; accessed 16 October, 2003.

⁴⁶ Hutton and Ellis.

⁴⁷ Scheiber.

⁴⁸ The Center For Internee Rights, Inc., "Accomplishments to Date," available from < <http://www.expows.com/Accomplishments.htm> > ; Internet; accessed 14 October 2003.

⁴⁹ Orend, 50.

⁵⁰ Thomas Hobbes' (1588-1679) view of man derives from his view of state: in the beginning every person was equal with equal rights, unlimited by law and morality. This causes every man to be able to hurt any other and vice versa. Naturally, this state is unpleasant; though

that situation may be called “rule of natural law”, but Hobbes stated that this natural is as good as no law at all. He describes the situation as “bellum omnium contra omnes” (“war of everyone against everyone”).

⁵¹ Theodor Herzl, “The Jewish State (Der Judenstaat),” January 1896; trans. Harry Zohn. available from < <http://www.wzo.org.il/en/resources/view.asp?id=287> > ; Internet; accessed 15 February 2004.

⁵² Ibid.

⁵³ John Hamre, *Iraq's Post-Conflict Reconstruction* (Washington D.C.: Center for Strategic and International Studies, 2003); available from < <http://www.csis.org/hill/ts030723hamreetal.pdf> > ; Internet; accessed 16 Jan 2004.

⁵⁴ Office of Budget and Management, *90 Day Update report on United States Strategy for Relief and Reconstruction in Iraq* (Washington D.C.: Office of Budget and Management, 14 July 2003).

⁵⁵ USAID.

⁵⁶ “There can be no peace on earth—no security for any man, woman or child—if aggressor nations like Germany and Japan retain any power to strike at their neighbors. It is not enough for us to say, “We will disarm Germany and Japan and hope that they will learn to behave themselves as decent people.” Hoping is not enough.” See Henry Morgenthau, *Germany is our Problem*, (New York and London: Harper & Brothers Publishers, 1945); available from < <http://www.ety.com/berlin/morgthau.htm> > ; Internet; accessed 9 September 2003.

⁵⁷ See the Treaty of Peace with Japan, Chapter IV for favorable trade provisions provided in terms of peace with the Allies. Signed at San Francisco, 8 September 1951.

⁵⁸ According to the UN charter members of the UN can not be placed in trusteeship. To do so would require a change to the charter. Rather than changing the charter, the thought is to reference the trustee structure in a UN resolution that establishes the relationship. See Tom Parker, *The Ultimate Intervention: Revitalizing the UN Trusteeship Council for the 21st Century* (Norway: Center for European and Asian Studies at Norwegian School of Management, April 2003); available from < <http://www.bi.no/dep2/ceas/> > ; Internet; accessed 14 February 2003.

⁵⁹ Coalition Provisional Authority, “Who We Are Overview,” available from. <<http://www.cpa-iraq.org/bremerbio.html> > ; Internet; accessed 14 October 2003.

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